Notes and Comments

Civil Commitment of Narcotic Addicts

In *Robinson v. California*[1] the Supreme Court gave its blessing to the humane view that narcotic addiction is an illness, not a crime. The Court found that a California statute which made the status of addiction a criminal offense imposed a "cruel and unusual punishment." However grave the menace which addicts may pose to society, it is unconstitutional under *Robinson* to put a man in jail for being an addict.[2] But it is permissible, wrote Mr. Justice Stewart, to protect the public by putting him in a hospital for treatment instead.[3]

Taking their cue in part from this dictum, California and New York have enacted sweeping programs providing for involuntary civil commitment of narcotic addicts.[4] Under these programs, any person is subject to prolonged confinement and compulsory treatment on a finding that he is addicted or in imminent danger of becoming addicted to narcotic drugs.[5] The commitment proceedings, which may be initi-

1. 370 U.S. 660 (1962).

2. In this Court counsel for the State recognized that narcotic addiction is an illness .... We hold that a state law which imprisons a person thus afflicted as a criminal ... inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment. *Id.* at 667.

3. In the interest of discouraging the violations of [laws prohibiting the unauthorized manufacture, prescription, sale, purchase, or possession of narcotics] ..., or in the interest of the general health or welfare of its inhabitants, a State might establish a program of compulsory treatment for those addicted to narcotics. Such a program of treatment might require periods of involuntary confinement. And penal sanctions might be imposed for failure to comply with established compulsory treatment procedures.
Id. at 664-65 (dictum).

4. CAL. WELFARE & INST'NS CODE §§ 3000-09, 3050-54, 3100-10, 3150-53, 3200-01, 3300-05 (West 1966); N.Y. MENTAL HYGIENE LAW §§ 200-12, *as amended*, (McKinney Supp. 1966). The California program is in fact a revised and expanded version of a commitment scheme originally enacted in 1961, a year before the *Robinson* decision. Ch. 850 §§ 2, 3 [1961] CAL. STAT. New York has provided for civil commitment of addicts under arrest for the commission of crimes since 1962. Ch. 204, [1962] Laws of N.Y. 957. Its new comprehensive program was enacted in 1966, to take full effect in April, 1967.

5. The New York statute defines "narcotic addict" to include not only "a person who is at the time of examination dependent upon [narcotic drugs] ...," but also one "who by reason of the repeated use of any such drug is in imminent danger of becoming dependent upon [them] ...." N.Y. MENTAL HYGIENE LAW § 201(2), *as amended*, (McKinney Supp. 1966). California defines a narcotic addict as "any person ... who is addicted to the unlawful use of any narcotic ... except marijuana," CAL. WELFARE AND INST'NS CODE § 3007 (West 1966), but provides for commitment of both addicts and persons who are "in imminent danger of addiction." § 3106. This specific commitment section does not expressly require a finding of imminent danger *by reason of repeated use*, but that limitation is included among the allegations necessary for a valid petition for commitment under § 3100.

ated by private citizens as well as public officials,[6] are fully adversary. The respondent has a right to notice, to a judicial hearing, to appointed counsel in case of need, and to jury review of an adverse finding.[7] Once the requisite state of addiction or imminent addiction has been established, however, the addict is summarily committed to the custody of a narcotic commission for hospitalization, subsequent supervised outpatient treatment, and re-hospitalization if necessary.[8] In principle, commitment continues until the addict is rehabilitated. The commission is obliged to discharge him after three years in New York[9] and after a maximum of ten years in California,[10] but these limitations appear to be largely illusory: if he is still addicted or if he becomes addicted again, a new petition and a new hearing will send him back to the commission for another round.[11]

It is also necessary for commitment of persons convicted of a crime under § 3051. Its omission from § 3106 is almost certainly not to be construed to authorize commitment of persons thought to be in imminent danger of addiction unless they have repeatedly used narcotic drugs.

The California Supreme Court struggled bravely to avoid defining both "addiction" and "imminent danger of addiction." In *In re* De La O, 59 Cal. 2d 128, 153, 28 Cal. Rptr. 489, 505, 378 P.2d 793, 809, *cert. denied*, 374 U.S. 856 (1963), it said that both phrases were nontechnical terms which "have a commonly understood meaning." In People v. Victor, 62 Cal. 2d 280, 301-02, 42 Cal. Rptr. 199, 212-13, 398 P.2d 391, 404-05 (1965), the court emphasized that addiction was a process, not an event, involving emotional dependence, physical tolerance, and physical dependence, but it abjured any "single definition . . . satisfactory for all purposes." Imminent danger of addiction, it said, is a point in the process at which a repeated user of drugs "is in imminent danger—in the commonsense meaning of that phrase . . . —of becoming emotionally *or* physically dependent on their use." *Id.* at 305, 42 Cal. Rptr. at 215, 398 P.2d at 407 (emphasis added). It thus implied that *addiction* could be found if there were either physical or emotional dependence alone. The opinion of the court notwithstanding, however, both these terms—and especially the whole concept of imminent danger of addiction—may raise questions of excessive vagueness under due process.

6. CAL. WELFARE & INST'NS CODE § 3100 (West 1966); N.Y. MENTAL HYGIENE LAW § 206(2)(a), *as amended*, (McKinney Supp. 1966).

7. CAL. WELFARE & INST'NS CODE §§ 3103, 3105, 3108 (West 1966); N.Y. MENTAL HYGIENE LAW § 206(2), (4), (7), *as amended*, (McKinney Supp. 1966).

8. CAL. WELFARE & INST'NS CODE §§ 3106, 3150-53 (West 1966); N.Y. MENTAL HYGIENE LAW § 206(4)(b), (c), *as amended*, § 212 (McKinney Supp. 1966).

9. N.Y. MENTAL HYGIENE LAW § 206(5), *as amended*, (McKinney Supp. 1966).

10. CAL. WELFARE & INST'NS CODE §§ 3200-01 (West 1966). The California release provisions are complex. An addict must be hospitalized for at least six months. After that, if he has sufficiently recovered, he may be released into outpatient care. *Id.* § 3151. He cannot be discharged, however, until he has successfully completed three additional years without use of narcotics as a supervised outpatient, subject to the 10-year maximum. *Id.* § 3200. Indeed, he must be discharged from the hospital (if he is still there) or from outpatient status after seven years of commitment unless it appears that, if not discharged, he may be able to complete three supervised, unnarcotized years. *Id.* § 3201.

11. California admits this unblushingly:

> Nothing in this chapter shall preclude a person who has been discharged from the program from being recommitted under the program, irrespective of the periods of time of any previous commitments.

CAL. WELFARE & INST'NS CODE § 3201 (West 1966).

The New York statute is silent on recommitment. However, by its terms any person found to be an addict is to be committed, and addicts who have previously been committed appear unmistakably to qualify.

Civil commitment thus provides an antiseptic way of doing thoroughly what the criminal law cannot do at all. Prolonged incarceration of the sick, barbaric when called "punishment," is now dressed respectably as a form of "treatment." Unfortunately, this humane therapeutic gloss on confinement of addicts is marred by a very poor prognosis. While physical dependence on drugs can be relieved in a matter of days, the psychological propensity to addiction is at least as intractable as any other personality disorder. Moreover the roots of addiction are commonly environmental as well as psychological, and a permanent cure accordingly requires both mental and social rehabilitation of the addict.[12] The new programs are the first to attempt this dual form of treatment on any large scale, and on this ground they hope to succeed where previous efforts have notoriously failed.[13] But it remains at best doubtful that either institutional therapy or limited occupational training and after-care on limited budgets will be adequate to the task. "[I]t is still only a minority of addicts who are known to benefit from treatment."[14] And even for that minority, "benefit" does not assure permanent cure.[15]

12. The crucial problem in the treatment of addicts will continue to be how to effect their rehabilitation into the community . . . .

Before and during addiction there was an absence of steady employment and stable family relationships; the objective disabilities associated with his racial, ethnic, and social class affiliations remain, and he has become enmeshed in a subculture which glorifies cynicism, kicks, and hustling while the square values of work, family responsibility, and respect for property and law are denigrated. The rehabilitation of addicts and the prevention of addiction may never be possible while the focus is on drug use alone; they may require a community approach with simultaneous efforts to provide employment, adequate housing and psychiatric treatment and to reduce racial and ethnic discrimination.

J. O'DONNELL & J. BALL, NARCOTIC ADDICTION 179 (1966).

13. The conventional view has been well summarized in Ploscowe, *Some Basic Problems in Drug Addiction and Suggestions for Research*, in JOINT COMMITTEE OF THE AMERICAN BAR ASSOCIATION AND THE AMERICAN MEDICAL ASSOCIATION ON NARCOTIC DRUGS, DRUG ADDICTION: CRIME OR DISEASE? 15, 88 (Interim Report) (1961):

[T]he exposure of a few months to a minimum amount of psychiatry, social case work, educational and vocational activity, cannot eradicate the deep seated necessity and compulsion for drugs which most addicts seem to have. There are no magic cures at narcotics hospitals. We simply do not know enough about the process of drug addiction to produce such cures.

The statistics on relapse to addiction after attempted cures at narcotics hospitals like Lexington, Fort Worth or Riverside tell the stark story of the basic failure of the hospital centered approach in dealing with problems of drug addiction.

Both new programs envision longer confinement, half-way houses to mitigate the effects of reentry into the community, and efforts to train the addict in new skills and even to help him find employment.

14. J. O'DONNELL & J. BALL, *supra* note 12, at 178. The full statement is:

There has . . . been some basis for hope in recent experiments with treatment. But it is still only a minority of addicts who are known to benefit from treatment, so the search for new ideas continues.

The "basis for hope" is the limited success New York and a few other states have had with treatment of criminal addicts while under sentence, coupled with parole supervision over subsequent drug use.

Thus, the new programs confront addicts with the real prospect of lifetime subjection to state supervision, punctuated by prolonged periods of complete confinement.[16] They provide scrupulous procedural protection, but their substance demands constitutional scrutiny as well. Even if it is not punishment within the meaning of the eighth amend-

> The combination of some degree of legal control over addicts, together with a treatment program to help him find a satisfactory role in society, seems to have been the most effective treatment yet devised.

Id. 177. This approach has also received the endorsement of the President's Advisory Commission on Narcotic and Drug Abuse. JOINT COMMITTEE OF THE AMERICAN BAR ASSOCIATION AND THE AMERICAN MEDICAL ASSOCIATION (Final Report), *supra note* 13. Yet not enough time has elapsed to evaluate finally the results of any of these programs, for

> [r]elapse to the use of drugs seems to be an integral part of the addiction syndrome. . . . The addict is likely to return to the use of drugs if his original motives for taking drugs . . . are not changed and he returns to the same environment.

Winick, *Narcotics Addiction and Its Treatment*, 22 LAW & CONTEMP. PROB. 9, 24 (1957). The mere deterrence of an addict from the use of drugs for a time does not constitute a permanent cure.

The most hopeful results have in fact come from programs whose operating principles seem to be inconsistent with involuntary treatment. Synanon, Daytop Lodge, and the program being developed by New York City's Narcotics Coordinator Dr. Efren Ramirez, all rely on the determination of the addict to cure himself. They employ reformed addicts (who are in short supply) to persuade addicts to enter the programs, and they rely on the pervasive pressure of a community dedicated single-mindedly to abstention from drugs to bring about a character transformation. *See* Ramirez, *A Comprehensive Plan for the Management of the Addiction Problem in New York City Based on the Puerto Rican Experience* (unpublished paper prepared for the Puerto Rican Conference, New York City, April 15-16, 1967); Shelly & Bassin, *Daytop Lodge—A New Treatment Approach for Drug Addicts*, 11 CORRECTIVE PSYCHIATRY 186 (1965); Volkman & Cressey, *Differential Association and the Rehabilitation of Drug Addicts*, 69 AM. J. OF SOC. 129 (1963).

New York State has contracted with the Ramirez program to undertake treatment of some of the addicts committed under the new law. But it is doubtful—albeit not impossible—that an addict who is forced into such a program against his will, will respond to the kind of treatment offered. Indeed, the most that the director of the state program claims for the law is that it "provides a compulsory setting" which removes the addict from the addict community and its influences. " 'But we still have to find the means to get him to participate voluntarily in the program,' he added. 'We can't force him to take treatment.' " N.Y. Times, July 11, 1966, at 1, col. 7. Similarly, the New York Academy of Medicine has concluded that:

> The mental and emotional fixations [of addiction] . . . are to be overcome only through the individual's own efforts and desires. Psychotherapy cannot be forced upon him with any hope of lasting benefit.

Committee on Public Health, Subcommittee on Drug Addiction, *Report on Drug Addiction*, 31 BULL. OF N.Y. ACAD. OF MED. 392 (1955), in J. O'DONNELL & J. BALL, *supra* note 12, at 190.

15. Indeed, Synanon does not believe that it can generally "cure" addiction, so that former addicts can "stay clean" without its help.

> The leaders have . . . used a theory of rehabilitation that implies that it is as ridiculous to try to "cure" a man of drug addiction as it is to try to "cure" him of sexual intercourse.

Its aim is simply to help addicts to stay away from drugs, which it does primarily by encouraging them to remain in the religiously anti-drug community. Volkman & Cressey, *supra* note 14, at 142.

16. *See* note 11 *supra* and accompanying text. Even if cure is ultimately effected, addicts face certain confinement for a minimum of six months in California. Under a voluntary program, Dr. Ramirez envisages complete confinement for a year as essential to successful treatment. *See* Ramirez, *supra* note 14, at 11.

ment, civil commitment of narcotic addicts raises serious questions of substantive due process.

The New Programs and the Existing Law of Civil Commitment

Civil confinement of addicts and drug users is by no means a new idea. Besides New York and California, thirty-two states and the District of Columbia authorize some such commitments.[17] But in practice these older statutes have been largely dead letters for want of treatment facilities.[18] The new programs patently mean business.[19] Unlike their predecessors, they make commitment mandatory once addiction or imminent addiction has been established: all their procedural safeguards are directed only against the possibility of a mistaken finding of addiction.[20] For the first time, state governments are seriously pursuing civil commitment as a solution to the narcotics problem.

Since there have been so few commitments, the case law on commitment of addicts is sparse. No case directly assesses the constitutionality of such commitments under the due process clause.[21] There are, how-

17. See F. LINDMAN & D. MCINTRYE, THE MENTALLY DISABLED AND THE LAW 87-88, table II-K (1961) for statutes in force in 1961. *See also* HAWAII REV. LAWS §§ 52-50 to 52-61 (1955).

18. 111 U. PA. L. REV. 122, 124 n.15 (1962); F. LINDMAN & D. MCINTYRE, *supra* note 17, at 19 n.48.

19. The New York program was enacted in response to an urgent executive request "To Make New York State the Safest Place To Live" by confining the principal perpetrators of crimes in New York City. *See* Rockefeller, Annual Message to the Legislature, 189th Sess., Jan. 5, 1966, reprinted in [1966] 2 McKinney's Session Laws of N.Y. 2975.

Moreover, in view of the provisions in both programs which permit any citizen to initiate commitment proceedings, *supra* note 6, not even the possibility of executive discretion in enforcement would provide any guarantee against widespread commitment: the programs are to this extent self-enforcing.

20. Under the new programs, once the respondent has been found to be an addict, the judge has no choice but to commit him.

> If, from the facts ascertained . . . , the judge or justice shall determine that . . . [a] person is a narcotic addict, he *shall* grant an order certifying such person to the care and custody of the commission for the period provided . . . ." N.Y. MENTAL HYGIENE LAW § 206(4)(c), *as amended*, (McKinney Supp. 1966) (emphasis added).
>
> At the hearing the court shall determine whether the person is addicted to the use of narcotics or in imminent danger of addiction . . . . If the issue is determined in the affirmative, the court *shall* order the person committed to the custody of the Director of Corrections . . . ." CAL. WELFARE & INST'NS CODE § 3106 (emphasis added).

Cf. D.C. CODE § 24-608 (1961): "If the court finds the patient to be a drug user, it *may* commit him to a hospital . . . ." (emphasis added).

21. The California Supreme Court has upheld the constitutionality of the California program against a challenge that it constituted cruel and unusual punishment. Citing *Robinson v. California*, 370 U.S. 660 (1962), that court found the issue to be

> whether the statutory scheme here challenged (a) imprisons petitioner "as a criminal," or (b) constitutes "compulsory treatment" of petitioner as a sick person requiring "periods of involuntary confinement." If the former it would be unconstitutional under Robinson as cruel and unusual punishment [citations omitted]; if the latter, it would be valid under the same decision as a constitutionally permissible exercise of the state's power to regulate the narcotic drug traffic.

In re De La O, 59 Cal. 2d 128, 136, 28 Cal. Rptr. 489, 494, 378 P.2d 793, 798, *cert. denied*,

ever, four old cases[22] involving alcoholics confined under statutes providing for involuntary commitments of "inebriate persons"—a statutory category which includes drug addicts as well as drunkards. These cases uniformly recognize the constitutionality of commitment of some, but not all chronic alcoholics, by analogy to the state's power to commit the mentally ill. They say that inebriate persons, like the insane, may be committed if they have lost their powers of self-control to such an extent that they are dangerous to themselves or others, are in need of care or treatment, or are in a broad sense incapable of managing their affairs. But with one exception[23] the cases also say that due process forbids commitment on grounds of habitual drunkenness alone.[24]

Yet these cases suggest no standards for determining how dangerous either to himself or others, or how unable to care for himself or his property, an inebriate person must be before he can be committed. Plainly, a power with the drastic consequences of civil commitment does have some substantive limits. Yet the constitutional case law on commitment of the mentally ill does surprisingly little to tell us what they are. The state courts initially decided to their satisfaction that

374 U.S. 856 (1963). In short, the court treated the *Robinson* dictum, *supra* note 2, as dispositive of the due process issue.

22. *In re* Hinkle, 33 Idaho 605, 196 P. 1035 (1921); Leavitt v. City of Morris, 105 Minn. 170, 117 N.W. 393 (1908); *In re* Schwarting, 76 Neb. 773, 108 N.W. 125 (1906); State *ex rel.* Larkin v. Ryan, 70 Wis. 676, 36 N.W. 823 (1888). The precise nature of petitioner's inebriacy in *Hinkle* is not clear from the opinion. He may have been an addict, but in Idaho the odds are he was an alcoholic.

23. *In re* Hinkle, 33 Idaho 605, 196 P. 1035 (1921), upheld, without reference to limitations or to the facts of the case, a commitment under a statute which applied to persons "so far addicted to the intemperate use of narcotics or stimulants as to have lost the power of self-control, or . . . subject to dipsomania or inebriety." *Id.* at 607, 196 P. at 1035.

24. In Leavitt v. City of Morris, 105 Minn. 170, 117 N.W. 393 (1908), the court said:

> There is . . . a clear distinction between a person who gets drunk and an insane person, and it may be conceded that one who is simply a drunkard, but is able properly to take care of himself, his family, and his property, and is not a menace to the public, cannot be committed to and detained in a hospital for inebriates without his consent, for the personal rights and liberties of such a person are guaranteed by the constitution . . . . *Id.* at 175, 117 N.W. at 395.

This formulation might not save many drunkards, depending on how the court understood the word "properly." On the other hand, while saying that commitment was designed for the protection of the individual as well as of others, the *Schwarting* court concluded that

> this power should be exercised with great caution and only upon such a state of facts being shown as would justify the forcible intervention of the state for the protection of persons and property.

76 Neb. 773, 775, 108 N.W. 125 (1906). Unless this formulation wholly begs the question, it would appear to limit commitment to cases of immediate danger to persons or property (including the person and property of the individual himself). Both these cases in fact upheld the commitments in question. In State *ex rel.* Larkin v. Ryan, however, the court struck down a commitment which was

> not made dependent upon his [petitioner's] inability to attend to business, nor upon any want of self-control, nor upon his being dangerous to himself or others, but solely upon his "being an inebriate habitual or common drunkard."

70 Wis. 676, 685, 36 N.W. 823, 827 (1888).

civil commitment of the insane was constitutional under the broad general criteria cited by the alcoholics cases, and let the matter go at that.[25] Since then, the official commitment decision has been left largely to the *ad hoc* discretion of asylum officials and the courts.

Thus, as to the constitutional issue, we write largely on a clean slate. At the very least, we would have to define the standards governing the application of criteria such as danger to self, danger to others, and incapacity to manage one's affairs. But in addition, there is a real question whether these criteria are the right ones to apply to assess the constitutionality of commitment of addicts. The analogy between "inebriacy" and insanity may be inapt. In the insanity cases, it is essentially petitioner's *insanity* which confers on the state *parens patriae* jurisdiction over him.[26] The criteria such as danger to self or others and need for treatment are conditions set for the purpose of determining who among the insane may be committed to an institution.[27] It is not at all clear that they are appropriate to a determination of who, though not insane, may be treated as if insane for purposes of commitment.

Moreover, in applying these criteria to justify particular commitments, the courts tend to treat as one the two distinct rationales for commitment represented by the alternatives in the dangerous-to-self-or-others formulation. Thus, in *In re Hinkle*, the court explained that

> [p]roceedings for the commitment of the insane, under whatever form the insanity may arise, are *paternal* in character. . . . In a

25. The right and duty of the State to provide for the care and treatment of its insane with such confinement and restraint of their liberty as may be necessary for that purpose is conceded. . . . It is also conceded that the State may, pursuant to general laws, and after proper judicial proceedings, confine insane persons for their own protection and that of other persons. . . . The writers and courts have not undertaken to define the limitations of the power which the State has to deal with these unfortunate people, except by the announcement of general principles essential to their welfare and the protection of the public.

In re Boyett, 136 N.C. 415, 418, 48 S.E. 789, 791 (1904).

26. The leading case is *In re* Josiah Oakes, 8 Law Reporter 122 (Mass. 1845). *See also, e.g.*, Porter v. Ritch, 70 Conn. 235, 39 A. 169 (1898); Van Deusen v. Newcomer, 40 Mich. 90 (1879).

27. In *Oakes*, Chief Justice Shaw wrote

> [I]t is a principle of law that an insane person has no will of his own. In that case it becomes the duty of others to provide for his safety and their own. . . .
>
> The question must *then* arise in each particular case, whether a person's own safety or that of others requires that he should be restrained for a certain time, and whether restraint is necessary for his restoration or will be conducive thereto.

8 Law Reporter 122, 125 (Mass. 1845) (emphasis added). The few constitutional cases and many statutes generally retain in some form this additional condition on the right to confine the insane, though some statutes under which modern courts make commitment decisions have dropped it. *See* F. LINDMAN & D. MCINTYRE, *supra* note 17, at 17-18. *Van Deusen v. Newcomer* suggests that insanity may itself establish the needed danger to self or others. 40 Mich. 90, 142 (1879) (opinion of Campbell, C.J.). *Accord*, Hammon v. Hill, 228 F. 999, 1001 (W.D. Pa. 1915): the right to restrain the insane is "a necessity growing out of the inability of the mentally afflicted to care for themselves or prevent injury to others."

> manner they are analogous to guardianship proceedings, but there is nevertheless a difference which readily distinguishes them from matters of guardianship . . . [i.e.] [t]he real basis or foundation for the proceedings . . . is *the protection and safety of the general public* against the acts of irresponsible persons, and . . . is predicated upon the general police power of the state.[28]

This confusion affects more than labels. Plainly the scope of the state's power of civil commitment depends on whether its ground for commitment is compassion or public safety. Outside the best of all possible worlds, the two grounds do not invariably coincide. With rare exceptions, however, the courts will treat civil commitments as both legitimately paternalistic and legitimately designed to protect the public. They emphasize its benevolent features to justify the absence of criminal procedural safeguards, and they cite the dangerousness of the petitioner as a justification for acting benevolently.[29] In the cases involving the totally insane this approach is not unreasonable. Confinement almost invariably does benefit such persons, who plainly need at least supervision, and their own opposition to commitment can fairly

28. 33 Idaho 605, 611-12, 196 P. 1035, 1037 (1921) (emphasis added).

29. *See, e.g.*, State *ex rel.* Sweezer v. Green, 360 Mo. 1249, 232 S.W. 2d 897 (1950). *See also* People v. Levy, 151 Cal. App. 2d 460, 468, 311 P.2d 897, 902 (1957):

> The main purpose of the act is to protect society against the activities of sexual psychopaths. The secondary purpose is to rehabilitate the sexual psychopath. . . .
>
> The emphasis that appellant places on the fact that he was originally convicted of a misdemeanor, and now finds himself in San Quentin, possibly for life, is misplaced. This argument would be sound only were his confinement punishment. As we have already seen, the purpose of the confinement is to protect society and to try and cure the accused.

This fusion of the two rationales is a more or less inevitable product of the natural human tendency to put the best face on an unhappy situation. In colonial times, local governments locked up the violently insane with little ceremony and less compunction under the police power. But in the 19th century, when the notion took hold that insanity is a curable disease, not the curse of a demon, the courts fastened on this new benevolent rationale for commitment and made it do double duty for the protection of the community as well. The *Oakes case*, 8 Law Reporter 122 (Mass. 1845), marks the absorption of the police power justification into the paternal power of *parens patriae*, which is now typically defined as

> the sovereign power of guardianship of persons under disability and the inherent and fundamental right and duty of the state to care for persons who are unable to care for themselves or who are a menace to themselves *or to the health, morals or safety of others.*

In re Keddy, 105 Cal. App. 2d 215, 222-23, 233 P.2d 159, 164 (1951) (opinion of Wilson, J.) (emphasis added). Shaw called the law of civil commitment "[t]he great law of necessity and humanity." *In re* Josiah Oakes, 8 Law Reporter 122, 124 (Mass. 1845). A later court concluded that

> [t]he work of the State in caring for the demented within her borders is at once protective in its character and highly humanitarian.

Hammon v. Hill, 228 F. 999, 1001 (W.D. Pa. 1915).

Necessity and humanity may often be one and the same, but the assumption built into the language of the law that they *are* one and the same is likely to produce unfortunate results.

be disregarded because "an insane person has no will of his own."[30] Their commitment may accordingly be justified by the interests of others as well as by their own. But for persons who do have "wills of their own" the legitimacy of commitment must be established either under the benevolent power of *parens patriae* or else under the police power to protect the community, each power standing alone.

These two grounds for state action must therefore be kept clearly distinct in analyzing the commitment statutes. If the state petitions for commitment on the ground that an addict is a menace to others, it is irrelevant that he might personally benefit from treatment, just as it is irrelevant to the requirements for imprisonment of a suspected criminal that he may receive treatment in jail. On the other hand, if the justification for commitment is paternalistic, the only question is whether the addict is the sort of person whose own best interests may legitimately be determined by others. The state cannot fuse an inadequate police power justification and an inappropriate exercise of paternalism into a jointly sufficient basis for commitment. In the discussion that follows, we shall examine each rationale for commitment in turn.

Civil Commitment of Narcotic Addicts Under the Power of *parens patriae*

The constitutional question under the power of *parens patriae* is not whether commitment is in the interest of the individual, but whether the state has the right to decide that question for him. It raises the larger question of when the state can coerce an individual for his own good. Yet on this crucial issue, constitutional case law is strangely mute.

It is clear that American traditions reflect a distinct bias against benevolent coercion. The conventional morality, the national political philosophy, and the theory of representative democracy itself are all

30. *In re* Josiah Oakes, 8 Law Reporter 122 (Mass. 1845).
The state has the right to commit insane persons for their own good without their consent because they are incapable of giving a meaningful consent. Shaw likens them to persons undergoing surgical operations (without anaesthesia) "where a person cannot have any will of his own and it becomes necessary that he should be held by others." *Id.*
Cf. Van Deusen v. Newcomer, 40 Mich. 90, 141 (1879): "The law has but one test of insanity, and that is whether a person is *compos mentis*, or capable of exercising rational self-control."
See also C. TIEDEMAN, LIMITATIONS OF POLICE POWER 106 (1886):
> [F]or the same reason that the proper authority may forcibly restrain one who is in the delirium of a fever and subject him to medical treatment, the State has undoubtedly the right to provide for the involuntary confinement of the harmlessly insane . . . . He is not a rational being, and cannot judge for himself what his needs are.

predicated on an assumption of individual self-government. Moreover, the founders thought they were writing a social contract, and the basic principle of the social contract is that restrictions on liberty are justifiable only when necessary for the *general* welfare. And the entire constitutional scheme reflects the Madisonian principle that the power of government must be checked and balanced because men cannot by their nature be trusted to pursue the interests of others.[31]

On the other hand, much welfare legislation of the 20th century has in it identifiable elements of paternalism, and self-determination is probably less a fundamental value than it once was. But no court has ever upheld any of these laws on the ground that it is reasonably designed to benefit the individuals it coerces. The courts have settled instead on the substantial police power grounds which also underlie the legislation.[32]

Thus, there is some question as to the legitimacy of any paternalism toward ordinary citizens which could not be sustained under the police power. But there is a much clearer bias against benevolent coercion which is exercised over selected individuals, and not over citizens generally. In that circumstance, no majority has consented to be coerced

31. *See* J. BURNS, THE DEADLOCK OF DEMOCRACY: FOUR-PARTY POLITICS IN AMERICA 8-23 (1963).

32. The assumptions underlying welfare legislation are: 1) that it is beneficial to the whole—*i.e.*, even to those who are not direct beneficiaries; and, more importantly, 2) that the majority of the persons who are to be protected against adversity in fact desire such protection. As to the minority who do not wish to have their liberty restricted for their own benefit, the legislation is not paternalistic; rather, their liberty is sacrificed to the general welfare of those who do.

The fluoridation cases are commonly cited as instances of judicial recognition of benevolent coercion over ordinary citizens. In several cases, fluoridation of drinking water was challenged as, *inter alia*, a violation of due process as compulsory treatment of individuals for their own good. Uniformly, the courts upheld the measures not as paternalistic treatment but as police power measures designed for the protection of the public health—especially the health of children. In *Kraus v. City of Cleveland*, petitioner contended "that every individual has as a part of his personal liberty the right to protect his health as he deems best to insure a long and happy life . . . ." The court conceded the premise but denied his conclusion therefrom:

> There can be no disagreement with this basic principle, it having been long recognized as sound, and the authorities support the proposition. . . .
>
> The right in an individual, however, is not an absolute right but is subject to the police power of the state. . . .
>
> The health measure with which we are concerned is designed to prevent caries in children and to give resistance to tooth decay . . . . Clearly any reasonable measure designed to decrease or retard the incidence of dental caries is in the interest and welfare of the public.

66 Ohio L. Abs. 417, 436-38, 116 N.E.2d 779, 794-95 (1953). *See also* Baer v. Bend, 206 Ore. 221, 292 P.2d 134 (1955); Dowell v. Tulsa, 273 P.2d 859 (1954); de Aryan v. Butler, 119 Cal. App.2d 674, 260 P.2d 98 (1953).

Of course, the more serious the deprivation of liberty involved, the less reasonable such general welfare measures become.

for its own good, and the unwilling victims of official altruism are impotent to obtain redress through the political process.

Outside commitment law, the state exercises benevolent supervision over ordinarily competent individuals only in matters concerning the disposition of property. Under existing law, a person may be subjected to legal guardianship on a finding that he is incapable of managing his affairs, or that he is a "spendthrift."[33] Similarly, state welfare laws often authorize case workers to superintend the way in which recipients spend their dole. But here too the primary purpose may not be benevolent. As one spendthrift statute reveals, a central concern is that the wastrel will "expose . . . [his] family to want or suffering or [his] town to expense."[34]

If wholly paternalistic coercion of ordinary citizens is legitimate at all, plainly it is subject to some limits more stringent than a good-faith legislative concern for the welfare of the individual coerced. In the absence of guidance from the courts, the best rule is probably to assume that the ordinarily competent citizen has a right to self-government limited only by the just claims of others. This right does not extend to incompetents, of course: the clear cases are children, lunatics, and imbeciles. The constitutional issue then becomes the question of who is incompetent when, for the right to self-government. Under this formulation, changing public attitudes toward paternalism will be reflected in an expansion (or contraction) of the scope of incompetence.

33. "Spendthrifts," who are subject to guardianship in almost one-fourth the states, F. LINDMAN & D. MCINTYRE, *supra* note 17, at 220, are typically defined as

> persons who, by excessive drinking, gambling, idleness or debauchery of any kind have become incapable of managing their own affairs, or who [so] spend or waste their estate as to expose themselves or families to want or suffering or their towns to expense . . . .

18 ME. REV. STAT. ANN. § 3601(2) (1964).

34. *Id.* For light relief, *cf.* Matter of Wilkie v. O'Connor, 261 App. Div. 373, 25 N.Y.S.2d 617 (1941) on coercion of welfare recipients. Petitioner had been denied his old age pension because he refused to stop living under a barn. His argument that he had a right to live as he chose, that his accommodations were good enough for the pioneers, and that after 65 years of living a good life he was entitled to old age assistance as a reward, fell on deaf judicial ears—but not because living under a barn was not good for him personally. The court declined to find from the record that petitioner had led a good life and, that question aside, concluded that "he should not demand that the public, at its expense, allow him to experiment with a manner of living which is likely to endanger his health so that he will become a still greater expense to the public." It also found that he had "no right to defy the standards and conventions of civilized society . . . at public expense." *Id.* at 375, 25 N.Y.S.2d at 619-20.

The point is not that the police power grounds are necessarily sufficient to justify such deprivations of liberty, but only that the existence of such laws does not necessarily imply a widespread recognition of the legitimacy of benevolent coercion of such persons. Welfare law, the law of guardianship, and the law of suicide (see note 36 *infra* and p. 1171) all suffer from the failure to distinguish between the paternalistic and the police power rationales. If some of these laws were analyzed in terms of these rationales separately, it is possible that neither rationale would be found to be sufficient.

And the scope may well vary depending on the kind and degree of liberty which the individual is required to sacrifice.

Where the constitutionality of involuntary civil commitment is at issue, then, the question is whether the individual is competent to decide for himself that he needs institutional treatment. Civil commitment for mental therapy is by all odds the gravest of all legally sanctioned deprivations of liberty, imposing as it does both prolonged confinement and a pervasive invasion of privacy.[35] Here, if anywhere, the scope of incompetence to decide for oneself must be gauged narrowly.

Existing law does not regard any adult as incompetent for these purposes unless he is suffering from a mental disease or defect or identifiable abnormality. Danger to self has never by itself been made grounds for commitment or compulsory treatment. Under the statutes, not even the danger of suicide, short of an actual attempt, justifies confinement absent a specific finding of mental disability. Of course, suicide and attempted suicide have long been made criminal. But these laws were not designed so much for the protection of the would-be suicide as for the vindication of divine and public morals and the preservation of the public peace.[36] Similarly, no law provides for compulsory treatment of cancer or heart disease, or any other non-contagious physiological ailment. The state's right to quarantine the potentially contagious,[37] to confine tuberculars,[38] to vaccinate against small pox,[39] and to treat for venereal disease[40] has without exception been rec-

35. For a discussion of mental hospitals as "total institutions," exacting a more comprehensive deprivation of liberty than mere prisons, *see* T. SZASZ, LAW, LIBERTY AND PSYCHIATRY 53 (1963). The success of the therapy provided necessarily entails a kind of indoctrination—an invasion and dominance of the patient's psyche.

36. *See* O'Sullivan, *The Ethics of Suicide*, 2 CATHOLIC LAW 147 (1956). The common law rule was formulated in Hales v. Petit, 1 Plow. 253, 75 Eng. Rep. 387 (C.B. 1563). The learned court found that suicide was in fact murder with malice prepense. As such it was "an offense against nature, against God, and against the King." As an offense against nature, it was "a thing most horrible," which still passes in some courts as a ground for state action under the police power. As an offense against God, it was a serious violation of the Commandment. Most interestingly, it was an offense against the King "in that hereby he lost a subject, and . . . he being the head has lost one of his mystical members." The King represents the community. The court makes this clear by adding finally,

> Also, [the suicide] has offended the King, in giving such an example to his subjects, and it belongs to the King, who has the government of the people, to take care that no evil example be given them, and an evil example is an offense against him.

Id. at 261, 75 Eng. Rep. at 400.

37. Compagnie Française de Navigation à Vapeur v. La. Board of Health, 186 U.S. 380 (1902).

38. Moore v. Draper, 57 So. 2d 648 (Fla. Sup. Ct. 1952).

39. Jacobson v. Massachusetts, 197 U.S. 11 (1905).

40. People *ex rel.* Baker v. Strautz, 386 Ill. 360, 54 N.E.2d 441 (1944).

ognized in the courts as a right to protect the community, not the individual.

All this does not prove that it would be unconstitutional to make danger to self or need for treatment sufficient in themselves to establish incompetence. The courts have never directly confronted that question.[41] But the original cases establishing the constitutionality of benevolent commitments of the insane assume that only the lack of an operative rational will in the person to be committed entitles the state to overrule his preference for freedom.[42]

That assumption is fundamentally sound. Incompetence to decide not to be hospitalized for treatment must be clearly distinguishable

41. In *In re* Estate of Brooks, 32 Ill. 2d 361, 205 N.E.2d 435 (1965), the Illinois Supreme Court decided that a probate court had erred in appointing a guardian for appellant to consent on her behalf to a blood transfusion necessary to save her life. Appellant was a Jehovah's Witness who objected to the transfusion for religious reasons, and the case was disposed of on First Amendment grounds. The court's discussion, however, may have a broader application.

Appellees argued that society had "an overriding interest in protecting the lives of its citizens" which justified benevolent coercion in such a case. They cited cases upholding compulsory vaccination, prohibition of polygamy and snake-handling, and the appointment of guardians to consent to a blood transfusion for a minor child and for the mother of a minor child. *Id.* at 367-68, 205 N.E.2d at 439-40, and cases cited. The court distinguished all these cases as involving potential harm to the public welfare (except the case of the minor child, whom the state may plainly regard as incompetent). *Id.* at 368, 205 N.E.2d at 437-40. In the absence of such a police power interest, it found that the state had no right to save appellant's life against her will.

> [F]or the courts to attempt to distinguish between religious beliefs or practices on the ground that they are reasonable or unreasonable would be for them to embark upon a hopeless undertaking and one which would inevitably result in the end of religious liberty.

Id. at 373, 205 N.E.2d at 442.

Whether the court would have attempted to determine the reasonableness of appellant's refusal had it not been grounded on religious belief is not altogether clear. But it does seem that the court's reasoning is equally applicable to benevolent compulsory civil commitments. Liberty itself may well be a preferred freedom. It is not apparent how courts can determine that a refusal to accept commitment for treatment based, *e.g.*, on an abhorrence of mental hospitals or on a preference for freedom in misery to confinement in comfort is unreasonable, without threatening liberty as much as a similar determination as to a religious belief threatens freedom of religion. Significantly, the court concludes, *id.* at 374, 205 N.E.2d at 442-43, by quoting the broader statement of Judge Burger, dissenting in Application of President & Directors of Georgetown College, 331 F.2d 1000, 1016-17 (D.C. Cir. 1964):

> Mr. Justice Brandeis, whose views have inspired much of the "right to be let alone" philosophy, said in Olmstead v. United States, 277 U.S. 438, 478 . . . (1928) (dissenting opinion):
>
> > The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.
>
> Nothing in the utterance suggests that Justice Brandeis thought an individual possessed these rights only as to sensible beliefs, *valid* thoughts, *reasonable* emotions, or *well-founded* sensations. I suggest he intended to include a great many foolish, unreasonable and even absurd ideas which do not conform, such as refusing medical treatment even at great risk.

42. *See* note 30 *supra.*

from commonplace irrationality, ignorance, or weakness of will. Only diagnosable mental disability can provide that clear distinction.[43]

But the mere presence of something which a psychiatrist is willing to call a mental aberration is not enough. In extending the *parens patriae* power from the old and clear categories of lunatics and idiots to the new and fuzzy categories of sexual psycopaths, defective delinquents, and "inebriate persons," the courts have adhered to the formal requirement established by the old insanity cases at the expense of its rationale. The essential requirement for a finding of incompetence is the presence of a mental disability which has substantial effects on the individual's capacity to make decisions for himself—i.e., on his powers of reasoning, understanding, perception, or self-control.[44] Moreover, where the issue is his competence to make a particular decision, his disability must be directly relevant to his capacity to make that decision. Thus, a man's incapacity to decide not to molest little boys may justify commitment on police power grounds; but it does not establish his

43. If the requirement of diagnosable mental disability were eliminated, it seems clear that an individual could, consistently with fundamental concepts of liberty, be denied the right to go untreated only on a showing that no reasonable man could prefer the sickness to the attempted cure, taking into consideration the effects of the disease, the probability of successful treatment, and the consequences attendant upon such treatment. Given the inevitable uncertainty of success in any medical treatment and the grave deprivation of liberty which involuntary hospitalization always involves, it is doubtful whether such a standard could in practice be met.

44. Compare the provision in the Draft Act on hospitalization of the mentally ill, which requires that a non-dangerous person committed on grounds of mental illness must lack "sufficient insight or capacity to make responsible decisions with respect to his hospitalization. . . ." NATIONAL INSTITUTE FOR MENTAL HEALTH, A DRAFT ACT GOVERNING HOSPITALIZATION OF THE MENTALLY ILL § 9(g)(3), at 9 (Public Health Service, pub. no. 51, 1952). The Commentary on this section notes:

> It should be emphasized that it is not a question of the individual agreeing or disagreeing with medical judgment as to the nature of his illness or the need for hospital care, but rather whether he is *capable* of making a responsible, not necessarily a wise, decision. . . .

Id. at 29.

> This requirement has been criticized on the ground that:
> the precise meaning of the term "responsible" is elusive. There is no clear statement of the factors which should be weighed in valuating the individual's "capacity" to make a "responsible decision." The subtle difference pointed out in the Commentary between the capacity to make a "responsible" decision and the capacity to make a "wise" decision proves illusory when one attempts to set up manageable criteria for involuntary hospitalization. It would seem, to cite only one objection, that an unwise decision in itself contributes some evidence of a lack of capacity to make a responsible decision.

F. LINDMAN & D. MCINTYRE, *supra* note 17, at 20.

The distinction between an incapacity to make a responsible or wise decision and the making of an irresponsible or unwise decision is clear enough, however. The difficulty is to identify such an incapacity. An apparently irrational opposition to treatment may be some evidence of incapacity, but, under the standard suggested here, it cannot be sufficient. It must also be established by competent medical testimony that the individual has a mental disability and that this disability has affected his decision-making capacity to an extent which markedly distinguishes him from the ordinary citizen of minimum standard intelligence.

incompetence to decide any other question, including the question of whether or not to undergo treatment for his problem.[45]

Paternalism and Narcotic Addicts

Narcotic addiction passes as a mental disability only because it typically involves psychological as well as physical dependence on drugs. The question is whether that psychological dependence on narcotics disqualifies an addict to decide for himself whether he wants to be cured.

The precedents imply that it does. In the few cases challenging inebriate commitment statutes, the courts reason that chronic alcoholics have by definition lost their powers of self-control; ergo, alcohol addicts may be committed on the same principles as insane persons.[46]

But if addicts have lost their powers of self-control, so have all chain smokers and compulsive gamblers. They have all lost control over a partial and clearly limited area of conduct, but not over conduct or decision-making capacity generally. They are unable to decide not to smoke or gamble, but they are as competent to decide to attempt a cure of their habit as to decide whether to undergo an operation or to come in out of the rain. Addiction, as a shorthand expression for compulsive psychological dependence, makes no man a ward of the state unless his weakness has some additional effects on his mental processes generally.

There is no evidence that addiction to narcotic drugs has such additional effects as would invariably warrant a finding of incompetence. Like some alcoholics, an addict may retain the capacity to run his own life in a tolerable and intelligent fashion apart from his habit.[47] Many persons can be addicted for decades without intellectual or moral deterioration. Doctors who are addicts maintain prosperous and competent practices and often lead such ostensibly normal lives that friends and neighbors do not even suspect their addiction.[48] Indeed, a few

45. Once incompetence has been established, however, it does not appear that the criterion of danger to self has constitutional significance. Since the individual is incompetent to decide for himself, the state has acquired the right to decide his own best interest for him. Even if he is not dangerous to himself, treatment may well be in his interest. On the other hand, even if he needs treatment, commitment might not be in his interest if the prospects for cure are poor, if the facilities are inadequate or demeaning, or if his abhorrence of hospitals is intense.

46. See the cases cited in note 22 *supra* and pp. 1164-65.

47. "The facts tend to indicate that the use of drugs like heroin and morphine is consistent both with a reasonable state of health and with a reasonable degree of efficiency on the part of the user." Ploscowe, *supra* note 13, at 46.

48. *See* R. DE ROPP, DRUGS AND THE MIND 147-48 (1957); Kolb, *Pleasure and Deterioration from Narcotic Addiction*, 9 MENTAL HYGIENE 699 (1925).

persons can function more normally as addicts than they ever could without drugs, which help them to cope with otherwise intolerable tensions.[49]

It is commonly said that under the influence of narcotics the most pressing of problems lose their urgency and recede into a distant limbo.[50] Logically an addict would thus be practically incompetent to decide about his need for treatment because drugs prevent him from confronting his own problems. But many addicts do in fact volunteer for both treatment and institutional confinement, and the evidence is that many more would do so if more, better publicized, and less apparently hostile facilities were made available.[51] There are even a few reported cases of self-cure.[52]

49. Ploscowe, *supra* note 13, at 47-49. Drugs may, at the very least, save the addict from a worse fate.

> What would our hypothetical maladjusted individual do if he did not turn to drug use? He would find some other means of coping with his problem which might be either more or less alarming than his addiction. He might turn to barbiturates or alcohol as a substitute for drugs. He might seek gratification by "acting out" his maladjustment through expressions of hostility, sexual aggressiveness, exhibitionism.

W. ELDRIDGE, NARCOTICS AND THE LAW 24 (1962). "As a matter of fact some who at one time were gutter alcoholics have improved themselves and their social functioning by shifting to morphine." Ploscowe, *supra* note 13, at 48.

50. It is difficult to assess the validity of this generalization. It does seem to be an accurate description of the typical addict in the street, but the reason may be less the effect of the drug than the constant preoccupation with obtaining it which is the lot of the impoverished addict. *See* Ploscowe, *supra* note 13, at 46-47. But the net effect of reducing the urgency of problems depends on how urgent the problems were before they were reduced. It may be that for some persons it is the reduction in urgency which enables them to confront their problems dispassionately. *See* note 49 *supra*.

51. "[I]ndividuals addicted to narcotics will voluntarily look for help if it is offered to them by people who understand them and who offer aid which realistically meets their particular needs."

> The narcotics program of the East Harlem Protestant Parish alone, with a full-time staff of 3, with a small office in an old store, with a program geared to help only those from the immediate neighborhood, has records of having seen 2,175 separate addicted individuals looking for help. This means that just under 5 percent of all the reported narcotics users in the United States and 10 percent of those in New York have of their own free will come to one agency asking for assistance.

Eddy, *The Quest for Help by Addicted Individuals in the United States*, in PROCEEDINGS, WHITE HOUSE CONFERENCE ON NARCOTICS AND DRUG ABUSE 175 (1962). Indeed, Dr. Ramirez believes that most addicts will voluntarily undertake long-term rehabilitation if they are approached by people they can trust and given confidence in the possibility of success. Ramirez, *supra* note 14.

A nagging difficulty with a requirement of voluntariness as a condition of treatment for any kind of mental disorder is the possibility that the disorder may prevent an afflicted person from admitting to himself that he has a disorder. *See Analysis of Legal and Medical Considerations in Commitment of the Mentally Ill*, 56 YALE L.J. 1178, 1184 (1947). In general, mental illness which may have this effect can on that ground establish incompetence.

It has been argued that most addicts are poorly motivated for treatment for this very reason—*i.e.*, that as psychopaths they typically refuse to believe that they are sick. AMERICAN MEDICAL ASSOCIATION, COUNCIL ON MENTAL HEALTH, NARCOTIC ADDICTION 36 (19—). The force of the argument is not altogether clear. Plainly, addicts know well enough that they suffer from *addiction*—*i.e.*, a compulsive need for drugs not shared by the population at large. Plainly, too, they know its principal effects. The argument may well be only that for the many addicts who have underlying psychiatric problems, addiction prevents them

Nor is the failure to volunteer for treatment good evidence of an incapacity to make rational decisions. The apparent irrationality of a particular decision is not ordinarily grounds for permitting the state to overrule it, but even if it were, an addict's refusal to be treated is not necessarily irrational. For one thing, even if the cure were always a lesser evil than the disease, the prospect of cure is uncertain and distant, and the prospects of long confinement and indefinite supervision are correspondingly excellent. Moreover, whatever his failings, the addict has a special competence with regard to assessing the value of treatment for him. He may not know what commitment would be like, but he better than anyone knows the evils of addiction, and he knows what his life was like before addiction. The point is not that addiction is bliss, but rather that for many addicts neither is life without drugs.[53] Even an informed, intelligent, and otherwise sane addict might conceivably prefer not to endure institutional confinement for the privilege of facing the world without a crutch.

Addiction itself, then, is not grounds for benevolent commitment. Nor, *a fortiori*, is an imminent danger of addiction resulting from the repeated use of narcotics.[54] Repeated use without addiction is not itself

from recognizing these problems and the need of treatment for them. ("They feel that, in the drug, they have the answer to their symptoms." *Id.*) Such addicts may well be committable on account of their underlying mental illness.

It is also possible, however, that the argument refers to the "psychopathy" of the addict as the disease he does not recognize. The American Psychiatric Association classifies drug addiction as a kind of "sociopathic personality disturbance." It says by way of definition:

> Individuals to be placed in this category are ill primarily in terms of society and of conformity with the prevailing cultural milieu, and not only in terms of personal discomfort and relations with other individuals.

AMERICAN PSYCHIATRIC ASSOCIATION, MENTAL DISORDERS 38 (1952). The real question here is whether persons who are "ill primarily in terms of society and of conformity with the prevailing social norms" can legitimately be said to "need treatment" for their own benefit at all. Compulsory treatment undertaken for such an "illness" seems designed for the benefit of society, not the individual. To argue that a psychopath or sociopath must be committed because he does not recognize his need for treatment of his sociopathic disorder begs the question of whether, from the standpoint of *his* interests, he "needs treatment" at all.

52. *See* Eddy, supra note 51, at 176. For a graphic description of one such self-cure, see DE ROPP, *supra* note 48, at 150-54.

53. *See* notes 12-16 *supra* and pp. 1162-64. The prospect for permanent cure of addiction is uncertain enough in itself. But even if the new programs do succeed in deterring addicts from the use of drugs by means of treatment, persuasion, and the threat of more-or-less perpetual subjection to official custody or supervision, this "cure" may be for some addicts a prescription for permanent unaddicted misery. The after-care and occupational training aspects of the new programs are admirable in conception. But the problems inherent in the rehabilitation of *non-addicted* members of alienated minority group subcultures belie the naiveté of great optimism about the prospects for rehabilitation of such persons who have in addition been narcotic addicts.

54. Both the new programs authorize commitment of any person found to be in imminent danger of addiction by reason of repeated use of drugs. *See* note 5 *supra*. As distinguished from addiction itself, this must mean that the physical and psychological compulsiveness of drug use which is the identifying characteristic of addiction as commonly understood is not yet present. Unless he has some other mental disability, a person in im-

a mental disability of any sort, nor is there here even that limited loss of self-control which some courts have in other contexts mistakenly thought to be sufficient for commitment.

But that is not to say that the state has no power to commit any narcotic addicts or narcotic users for their own good. Many addicts suffer from serious mental disturbances which, either by themselves or as aggravated by prolonged addiction, may be grounds for commitment. Addiction is most often a sign of an underlying emotional disturbance. The disturbance may be no more than the neurosis of the aggressive businessman, but it may also be symptomatic of the kind of mental illness which can deprive an individual of the capacity to make decisions for himself which are entitled to respect.[55] Prolonged addiction itself may sometimes lead to a general deterioration of behavioral controls or to a kind of racking insanity, comparable to the alcoholic's delirium tremens. In all these cases the addict is committable: not, however, *qua* addict, but *qua* incompetent.

Civil Commitment of Narcotic Addicts Under the Police Power

Where the benevolent rationale is insufficient, the case for civil commitment must be argued in the unfamiliar language of preventive detention. Narcotic addicts are reportedly responsible for half the crimes commited in New York City, and the prospect of catching all those potential criminals in a single Supreme Court-proof net has constituted the principal legislative appeal of the new commitment programs.[56] Commitment has also been touted as an effective means

minent danger of addiction stands in *pari materii* with a cardiac patient in imminent danger of a heart attack by reason of repeated over-exertion. Over-exertion may perhaps be deemed more "rational" conduct than repeated use of drugs (but query?). The problem is that there is nothing on which to sustain a finding of incompetence which would permit the state to make that judgment for an individual and enforce it on him.

55. Drug addiction is usually symptomatic of a personality disorder . . . ; the proper personality classification to be made is an additional diagnosis. Drug addiction [may be] symptomatic of organic brain disorders, psychotic disorders, psychophysiological disorders, and psychoneurotic disorders. . . .

AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 51, at 39. These underlying disorders may or may not be sufficient to establish incompetence in an individual case. *See also* W. ELDRIDGE, NARCOTICS AND THE LAW 21-24 (1962).

56. *See* Rockefeller, *supra* note 19. The Governor touted his program as an anti-crime measure in his campaign for reelection in 1966. At one news conference, he said

that anybody who liked crime on the streets ought to vote for Frank D. O'Connor.

. . . .

"Frank O'Connor's election would mean," he said, "that narcotic addicts would be free to continue to roam the streets: to mug, to purse-snatch, to steal, and even to murder."

N.Y. Times, Oct. 29, 1966, at 23, col. 3.

Addicts do have a high crime rate, but not *that* high. The 50 per cent figure appears to be a canard, since it apparently includes violations of the narcotic prohibition laws, which

of stemming the spread of addiction to new victims:[57] institutionalizing addicts removes from the population at once a source of contagion and the largest body of violators of the laws prohibiting purchase, use, possession, and sale of narcotics. The question is whether any of these public interests can justify confinement of all addicts.

Preventive Detention Under Due Process: The Certainty of Harm

Preventive detention is constitutionally disfavored, but precisely how disfavored is a question the courts have managed to avoid. Indeed, a measure of its disfavor is the extent to which its presence is camouflaged in orthodox legal doctrine.[58] Whenever possible, the courts have preferred to justify civil commitments as acts of benevolence on the basis of their provision for treatment.[59]

nearly all addicts necessarily break every day. *See* SENATE COMM. ON THE JUDICIARY, THE ILLICIT NARCOTICS TRAFFIC, S. REP. No. 1440, 84th Cong., 2d Sess. 2-3 (1956).

57. *See* Kuh, *Civil Commitment and Probation*, in PROCEEDINGS, WHITE HOUSE CONFERENCE ON NARCOTIC AND DRUG ABUSE 184, 185 (1962).

58. The right to bail (except in capital cases), the constitutional protection against "excessive" bail, and the orthodox doctrine that the sole permissible consideration in setting bail is the need to deter the defendant from absconding, make an obvious case in point. *See, e.g.*, Stack v. Boyle, 342 U.S. 1 (1951); People *ex rel.* Sammons v. Snow, 340 Ill. 464, 173 N.E. 8 (1930). The practice, of course, is often understandably different where the defendant is a recidivist felon or where there is good reason to fear retaliation against witnesses; and not all judges are as candid as the judge in the *Snow* case, who expressly stated in fixing exorbitant (for ensuring appearance at trial) bail, "If I thought he would get out on that I would make it more." *Id.* at 469, 173 N.E. at 9. Without some such candor an appellate court has a hard time finding most bail amounts unconstitutionally excessive.

Vagrancy laws are also commonly employed to confine persons thought to be dangerous but guilty of no more precise crime. *See* Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960).

59. *See* note 29 *supra*. This tendency is so pervasive that there is doubt in some quarters whether *any* purely preventive detention is permissible. *See, e.g.*, Goldstein & Katz, *Dangerousness and Mental Illness: Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity*, 70 YALE L.J. 225, 237 (1960): "Sickness of the individual and his need for treatment or care is the only justification for using 'likelihood of dangerousness' as a basis for deprivation of liberty." *See also* Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288, 1291 (1966):

> The *Robinson* dicta suggesting that civil commitment is constitutional are in paragraphs expressing a favorable attitude to state action . . . assuring treatment for ill citizens. But commitment of dangerous persons is a harder case, because the chief purpose of such a measure is to afford protection for society, not to ensure treatment of the patient. If a case arose in which medical testimony indicated that a patient could not be helped by treatment . . . , but he was nonetheless committed as dangerous, the court might well hold that the state was punishing the patient for an illness and thus inflicting cruel and unusual punishment.

Such a case did in fact arise, after a fashion. *See* Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966), where the court found a statutory right to treatment for persons committed pursuant to an acquittal by reason of insanity and called involuntary civil confinement without treatment "shocking," *id.* at 455.

But this view of commitment of the dangerous is misconceived in two respects. First, whether, on balance, treatment would confer a "benefit" is, for competent persons, a question to be decided by the individual concerned, not the state. If a sane and intelligent old tubercular would rather live his remaining days in freedom with his family, the state would be obliged to allow him to do so if it could not commit him on grounds of dangerousness.

No one seriously doubts that the state may commit persons suffering from contagious diseases. But beyond those instances of virtually certain danger to others, there is very little case law in point. In *Minnesota* ex rel. *Pearson v. Probate Court*, the Supreme Court held constitutional a sexual psychopath law which authorized commitment of persons who

> by an habitual course of misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desire.[60]

The Court found that the statute as construed was not unconstitutionally vague, but it had nothing to say about the requisite standard of likelihood.[61] In *Lynch v. Overholser*,[62] on the other hand, the Court refused to permit commitment of a defendant who had been exculpated on a plea of insanity entered for him against his will. The holding is limited, but the grounds of the opinion strongly intimate that the commission of a crime, coupled with the possibility of mental illness, does not itself prove a man dangerous enough to warrant his confinement on grounds of dangerousness alone.[63]

The logical conclusion of a theory which justifies commitment only on grounds of benefit to the individual is that only *incompetent* dangerous sick people can be committed.

Second, it cannot seriously be contended that the state has *no* right to restrain the violently contagious or the violently insane. The right of self-protection is as old as the common law and as durable as common sense. The state may have a duty in such cases to provide treatment wherever possible. But its right to confine is not contingent on the possibility of treatment, even if it may be contingent on the provision of treatment where treatment is possible.

This fundamental confusion about preventive detention is a direct result of the courts' tendency to merge the two separate rationales for civil commitment into one multi-purpose but invariably benevolent state power. *See* note 29 *supra*.

60. 309 U.S. at 273.

61. The Court did say that the statute calls for "evidence of past conduct pointing to probable consequences," and it suggested that if sexual psychopaths were defined merely as persons "guilty of sexual misconduct" or "having strong sexual propensities," the statute would be "perhaps unconstitutional in its application." *Id.* at 273-74. It is worth noting that the requirement of *utter* lack of power to control sexual impulses coupled with evidence that that lack of power leads to illegal and injurious conduct in the case of the petitioner, does in fact yield a very high degree of certainty that he will cause harm to others if not committed.

62. 369 U.S. 705 (1962).

63. Mr. Justice Harlan said he was constrained to hold inapplicable a District of Columbia statute which provided for mandatory civil commitment after a successful insanity defense, in order to "free it from not insubstantial constitutional doubts."

> [T]he fact that the accused has pleaded guilty or that, overcoming some defense other than insanity, the Government has established that he committed a criminal act constitutes only strong evidence that his continued liberty would imperil "the preservation of public peace." It no more rationally justifies his indeterminate commitment to a mental institution on a bare reasonable doubt as to past sanity than would any other cogent proof of possible jeopardy to "the rights of persons and of property . . . ."

As to commitment under the statute following *voluntary* insanity pleas, the Court specu-

As a general rule, Anglo-American law permits prolonged confinement for the protection of society only where a man has been proven beyond a reasonable doubt to have been legally responsible for the commission of a criminal act.[64] A culpable criminal act is, of course, some evidence of dangerousness, and imprisonment does serve *inter alia* a preventive detention function. But the principal rationale of the act requirement is the belief that it is ordinarily unjust to punish a man or to sacrifice him for community purposes unless he has wrongfully harmed the community. For the same reason, the Constitution obliges the state to set a convicted criminal free after he has served a prison term deemed commensurate with the gravity of his offense—even if he is still as dangerous as he was on the day he went in.[65]

If in extreme cases the state also has some power to confine on the

lated that Congress might have intended thereby to discourage false pleas of insanity. But it did not consider the constitutional sufficiency of that concern as a ground for confinement.

64. It has been said that it is "the fundamental function of the criminal law to safeguard every individual from the imposition of sanctions solely for his potential dangerousness." Goldstein & Katz, *Dangerousness and Mental Illness: Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity*, 70 YALE L.J. 225, 237 (1960). *Cf. In re* Williams, 157 F. Supp. 871 (D.D.C.), *aff'd*, 252 F.2d 629 (D.C. Cir. 1958):

> The staff of St. Elizabeth's Hospital advised that Dallas O. Williams at the present time shows no evidence of active mental illness but that he is potentially dangerous to others and if released is likely to repeat his patterns of criminal behavior, and might commit homicide. *Id.* at 872.

But the court ordered his release:

> However commendable was the court's purpose to protect the public from the release to society of a man "potentially dangerous to others," there is no District of Columbia statute or inherent equity power permitting commitment to any institution upon that showing alone. Many persons who are released to society upon completing the service of sentences in criminal cases are just as surely potential menaces to society as is this petitioner, having a similar pattern of anti-social behavior, lack of occupational adjustment, and absence of remorse or anxiety; yet the courts have no legal basis of ordering their continued confinement on mere apprehension of future unlawful acts, and must wait until another crime against society is committed or they are found insane in proper mental health proceedings before confinement may be ordered. *Id.* at 876.

The statutes of only one state authorize commitment of psychopaths, other than sexual psychopaths—that is, of persons whose mental "illness" consists solely in a failure to internalize community norms inhibiting antisocial conduct. F. LINDMAN & D. MCINTYRE, *supra* note 17, at 18; MASS. GEN. LAWS ANN. ch. 123, § 1 (1965) (" 'mentally ill' person . . . shall mean [*inter alia*] a person subject to a . . . character disorder which renders him so deficient in judgment . . . that he . . . is likely to conduct himself in a manner which clearly violates the established laws, or ordinances, conventions or morals of the community.") *But see* Dodd v. Hughes, 81 Nev. 43, 398 P.2d 540 (1965). Arguably, this is the most generally dangerous class of persons in the population.

65. The generally accepted view is that:

> imprisonment for such a length of time as to be out of all proportion to the gravity of the offense committed, and such as to shock the conscience of reasonable men, is cruel and unusual within the meaning of the constitution.

State v. Evans, 73 Idaho 50, 58, 245 P.2d 788, 792 (1952), and cases cited therein. *See also* Weems v. United States, 217 U.S. 349 (1910); State v. Kimbrough, 212 S.C. 348, 46 S.E.2d 273 (1948). The question is ultimately one of fundamental universal standards of decency, not of rationality. *See* Packer, *Making Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1076 (1964).

sole ground of probable dangerousness to others, that power must be subject to limits as stringent as those which govern confinement of actual criminals. Preventive detention, no less than imprisonment, is a deprivation of liberty in the interest of the community. The conditions of confinement may be strikingly similar. Unless the civil inmate is incompetent, the fact that he may be provided treatment does not distinguish the two types of incarceration, since the civil inmate may be untreatable and since treatment may also be provided to imprisoned criminals.[66] From the point of view of the person confined, the shade of difference between civil preventive detention and criminal confinement is in the associated stigma, and it is at most a shade. The state does not notably enhance a man's community standing by branding him a drug addict, a sexual psychopath, or a dangerous lunatic, rather than a criminal.[67] Even the slightest difference is hard to perceive in the case of narcotic addicts who are committed in an atmosphere of public clamor over their supposed inveterate criminality. It is primarily life and liberty which the Constitution protects at such potentially great cost to the public safety; and it would in any case be extraordinary if these were guarded less thoroughly than reputation.

Since the fundamental value at stake is identical, the constitutional restrictions must likewise be the same for both civil and criminal confinements. In particular, the state must sustain as heavy a burden of proof in order to detain a dangerous person as it must to imprison a criminal: that is, dangerousness must be shown beyond a reasonable doubt.[68] To permit preventive detention on any lesser showing of

66. It might be different if treatment could be simply and effectively provided with a minimal deprivation of liberty. See pp. 1185-87 *infra*. But prolonged confinement is no less preventive detention because it also attempts to work a preventive cure. Similarly, the fact that treatment may be beneficial to the inmate is irrelevant unless the state has the right under the power of *parens patriae* to force treatment on him for his own good. And if it has that right, it need not rely on its power of preventive detention in order to justify commitment.

67. The cases which support different procedural standards for civil and criminal commitments rarely confront the ground for distinction between preventive detention and imprisonment. Wherever commitment is predicated in part on the presence of a mental illness, the courts tend to treat the proceedings as paternal in character and argue in effect that even if the commitment also serves a preventive detention function, it is essentially a benevolent, non-adversary proceeding because it is in the interest of the petitioner. *See* note 29 *supra*.

68. But some sexual psychopath statutes provide for commitment on grounds only of danger to others. Here, the theory is that "civil" commitments are not subject to the constitutional protections accorded criminal defendants because they are not retributive and therefore not punishment. It is evidently this distinction which the Court found persuasive in Robinson v. California, 370 U.S. 660 (1962), in distinguishing between addiction as a crime and addiction as a ground for civil commitment. See especially the concurring opinion of Mr. Justice Douglas, 370 U.S. 668, 676-77:

> Cruel and unusual punishment results not from confinement, but from convicting the addict of a crime . . . . The purpose of [the statute] is not to cure but to penalize. . . .

dangerousness could be justified only if there were a substantial practical difference between the criminal and the civil sanction.

It is said that contingent harm can never be proved beyond a reasonable doubt.[69] But in some cases it is surely possible to predict harm as confidently as a second-hand trier of fact can conclude that a particular act was performed with a particular intent.[70] If as a result of this requirement preventive detention is in practice available only in exceptional cases, that is as it should be. Given the difficulty of predicting human behavior, preventive detention is and ought to be an extraordinary expedient.

A man suffering from contagious disease will cause harm to some

> A prosecution for addiction, with its resulting stigma and irreparable damage to the good name of the accused, cannot be justified as a means of protecting society where a civil commitment would do as well.

Where the issue is the meaning of "punishment" in the 8th Amendment, it may be appropriate to define it in the traditional terms of retributive (as well as preventive or curative) intent. Thus anticipatory civil commitment, no matter what its practical effect, could never be a cruel and unusual punishment. But where the issue is the applicability of fundamental due process protection against a deprivation of liberty, surely it is the extent and consequences of the deprivation, not the character of the form under which the deprivation is brought about, which is paramount. Incarceration by any other name confines as much. The form is important only insofar as it may affect the consequences of confinement to the person confined. As to that question, Mr. Justice Clark's dissenting remarks seem to have much force:

> Any reliance upon the "stigma" of a misdemeanor conviction in this context is misplaced, as it would hardly be different from the stigma of a civil commitment for narcotics addiction.

370 U.S. at 683n.1. In spite of the best efforts of knowledgeable writers the public knows an addict as a "dope fiend," an inveterate criminal and a moral degenerate. *See* Eldridge, *supra* note 49, at 13-28. And "it is common knowledge that the man with the brand of 'addict' burned upon his reputation is almost impossible to place" in a job. Eddy, *supra* note 51, at 177.

The cases are silent on the specific question of burden of proof that harm to others will result if the respondent in a preventive detention proceeding is not confined. This silence reflects the general failure to develop standards for determining how dangerous a man must be to be subject to civil commitment. *See* pp. 1164-65, *supra*. And witness the general paucity of cases in which commitment is conceded to rest on the power of preventive detention. The general existing rule on commitment of the mentally ill as derived from the practice of the courts is that "there must exist that degree of mental unsoundness as to make it *reasonably* probable that, if allowed to remain at large, [respondent] would . . . endanger life, person, or property . . . ." 44 C.J.S. *Insane Persons* § 64 (1945) (emphasis added). But this rule has been derived from cases which assume that the mental illness of the respondent confers on the state *parens patriae* jurisdiction over him. The question in those cases has been: given his insanity, how dangerous must a man be to himself or others before he can be committed? They were not addressed to a situation where the right to commit depends solely on the respondent's dangerousness, regardless of its origin, and where his incompetence is irrelevant.

69. Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288, 1291 (1966). The objection seems to be essentially verbal. It is true that "it might never be possible to show 'beyond a reasonable doubt' that a person is [highly] likely to behave dangerously," *id.*, because "beyond a reasonable doubt" and "likely" are different standards. But the standard of likelihood and the standard of proof are not two different standards, but the same. What is at issue is whether the respondent will in fact cause harm unless he is confined. The various standards of proof correspond to varying degrees of certainty as to future conduct which are to be required of the trier of facts.

70. Perfect certainty is impossible in both cases.

other person beyond a reasonable doubt. So will a raving lunatic. Admittedly, proof of future acts beyond a reasonable doubt will be practically impossible to achieve in the absence of some form of identifiable mental abnormality which deprives a man of power to control his dangerous impulses. But for police power commitments, the requisite mental "illness" may be broadly defined to include those limited personality disorders, including drug addiction, which are irrelevant to the legitimacy of commitment under the power of *parens patriae*.[71]

The Dangerousness of Narcotic Addicts

The question, then, is whether addiction *per se* renders all its victims public menaces? Can it be said, beyond a reasonable doubt, that narcotic addicts will cause harm to others unless they are confined? Addicts are widely thought to be compulsive criminals as well as compulsive drug users, and if we were sure that an addict would mug old ladies, there is little doubt that he could be confined indefinitely.

But in fact, the drug addict *qua* addict poses no special threat to the public lives or limbs.

> The effects of opiates are, in general, exactly the opposite of the effects of alcohol, which tends to reduce normal inhibitions and to release aggressions. . . . The sense of well-being and satisfaction with the world are so strong that, coupled with the depressant action of the drug, the individual is unlikely to commit aggressive or violent crime after he is addicted, even though he professionally or habitually did so previous to addiction. . . . In the words of Kolb, "Both heroin and morphine in large doses change drunken fighting psychopaths into sober, cowardly, non-aggressive idlers."[72]

In a rare display of scholarly unanimity, all the experts on addiction agree that "crimes of violence are rarely, and sexual crimes almost never, committed by addicts."[73]

The crimes addicts are very likely to commit are offenses against property, especially petty theft. An addict's habit may cost him any-

71. Thus if "sociopathic personalities" can be convincingly diagnosed, it is reasonable to permit such a diagnosis to qualify as a potential ground for police power commitments, though it is unreasonable to allow it as a ground for commitment for the good of the individual. In refusing to permit commitment of such persons, note 64 *supra*, the law has here fallen prey to its failure to separate in its thinking the separate rationales for commitment.

72. D. MAURER & V. VOGEL, NARCOTICS AND NARCOTIC ADDICTION 215-16 (1954).

73. JOINT COMMITTEE OF THE AMERICAN BAR ASSOCIATION AND THE AMERICAN MEDICAL ASSOCIATION (Final Report), *supra* note 13, at 165. The Joint Committee concluded that "in terms of the number afflicted and . . . ill effects on others in the community, drug addiction is a problem of far less magnitude than alcoholism." *Id.*

where from $35 to $70 a week.[74] The vast majority of addicts do not ordinarily make that kind of recreation money. Hence, it would often be possible to prove beyond a reasonable doubt that a given addict will steal.[75] On the other hand, it is clear that no such showing could be made for every addict. Some addicts are rich, some hold steady jobs, and a small but significant minority are doctors who have access to drugs at moderate prices.

The other substantial harm to which addicts contribute is the spread of addiction to other persons. Narcotic addiction is, in a sense, contagious. It spreads through contact with addicts, in much the same way as does cigarette-smoking or any other acquired habit. Contact with addicts may suggest to the uninitiated the possibility of using narcotics, provide him with information as to sources of supply and techniques of use, and introduce him to an environment in which such use is socially approved. If all addicts were behind bars, fewer persons would experiment with narcotics and fewer would become addicted.

But without evidence that a particular addict is a pusher or a proselytizer, it could never be shown beyond a reasonable doubt that he will cause another to become addicted. In pertinent contrast, such a showing could be made that a tubercular will at some time infect some other person.[76]

Moreover, even if an addict does by the mere fact of his existence contribute to another's addiction, his responsibility is indirect and fractional. It is shared with many other drug-users and with the person who becomes addicted. The state does have some power to restrict the liberty of persons who are collectively dangerous where it cannot show the dangerousness of each individual. But that power, applicable to

74. Chein, *Narcotics Use Among Juveniles*, 1 SOCIAL WORK 50 (1956), in J. O'DONNELL & J. BALL, *supra* note 12, at 128.

75. Commitment predicated partly on grounds of poverty might well give courts pause, however. Doubtless it could, on the same kind of evidence, also be proved beyond a reasonable doubt that various destitute persons who for some reason do not receive welfare payments will steal.

Whether the certain danger of theft is in any case grave enough to warrant commitment is, of course, an additional question.

76. It is the biological cause-effect relationship between exposure and infection which makes communicable disease, even if not highly contagious, an unquestioned ground for preventive detention. All that is required is the virtual certainty that someone, somewhere will be infected by the diseased person. The presence of contagious infection may provide that certainty beyond a reasonable doubt; but the "contagion" of addiction depends on the chance effects of an addict's contacts and the personalities of the persons with whom he mingles.

Clearly, too, the probability that an addict will be responsible for another's addiction depends on the conspicuousness of his addiction. Addicts who conceal their addiction from all but family and close friends, *e.g.*, addicted doctors, are extremely unlikely to cause the spread of addiction by social contact.

vaccinations, curfews, and emergency quarantines, cannot extend to prolonged total deprivations of liberty.[77]

Finally, it is undeniably true that nearly all addicts will purchase or possess narcotics illegally as a matter of course. Probably the prevention of such violations would never be seriously advanced as a sufficient ground for civil commitment of addicts. But if it were, it is open to an objection which applies equally to the argument from the certainty of theft. In both cases, the virtual certainty that addicts will break the law is in a direct sense the state's own fault. An addict's need for narcotics is by definition beyond his control. By denying him legal access to narcotics, the state makes him *ipso facto* an habitual criminal. By obliging him to obtain his drugs at exorbitant black market prices, the same legislative policy also drives poor addicts inexorably to theft. It flouts fundamental fairness for the state to force a man to commit crimes and at the same time to punish or confine him on grounds of his resultant criminality.

Perhaps due process could tolerate such unfairness to individuals if the legislative policy served a compelling public need which could be met in no other way. But there are effective alternatives to prohibiting narcotics to narcotic addicts. A properly supervised program under which doctors were allowed to prescribe limited quantities of narcotics to addicts would not significantly impair—and might well enhance—the effectiveness of the state's control of drug use and the narcotic traffic generally. Apart from its alleged "immorality."[78] the principal objection

77. The quarantine principle does permit some group deprivations of liberty without regard to the injustice done to individuals. But the distinguishing features of quarantines, curfews, and the like are: 1) that they are temporary, 2) that they are in the nature of emergency measures, and 3) that they are less than total deprivations of liberty. In contrast, civil commitment of narcotic addicts is a permanent institutional approach to an enduring social problem, and involves prolonged incarceration.

Ultimately, of course, the issue is one of just proportion between means and ends. The drug problem is serious, but the proposed means are extreme. *Cf.* Korematsu v. United States, 323 U.S. 214 (1944), where the Court upheld the exclusion of citizens of Japanese ancestry from their homes only as an exercise of the war power in a time of total war. The Court was at pains to make clear that:

> [n]othing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either [exclusion from homes or permanent night-time curfews] . . . . Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direct emergency and peril is inconsistent with our basic governmental institutions.

Id. at 218-20. Two Justices thought the exclusion even in time of war to be flagrantly unconstitutional. *Id.* at 225 (dissenting opinion of Roberts, J.), *id.* at 233 (dissenting opinion of Murphy, J.).

78. A Senate subcommittee rejected this approach with righteous indignation:

> Finally, we believe the thought of permanently maintaining drug addiction with "sustaining" doses of narcotic drugs to be utterly repugnant to the moral principles inherent in our law and the character of our people.

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to such a program is the fear that addicts will obtain more drugs than they need and peddle the surplus. Addicts who did so could, of course, be punished severely, and the sanctions would almost certainly be more effective where the addict is not already a criminal by virtue of his addiction. Moreover, effective supervision could in all likelihood limit the dosage to the individual need.[79] In any case, the possibility that some addicts might cheat must be set against the advantages to law enforcement of close and regular contact with the addict population and the denial to the illicit drug merchants of the bulk of their market. Thus, if there is any social cost to such a program, it would be nominal. Its benefit would be the virtual elimination of the criminality resulting from addiction.[80] Therefore, even if it is not unconstitutional for the

CRIMINAL CODE, THE CAUSES, TREATMENT, AND REHABILITATION OF DRUG ADDICTS, S. REP. No. 1850, 84th Cong., 1st Sess. 13 (1955).

See also Ausubel, *Controversial Issues in the Management of Drug Addiction: Legislation, Ambulatory Treatment, and the British System*, 44 MENTAL HYGIENE 535 (1960), in J. O'DONNELL & J. BALL, *supra* note 12, at 195. Ausubel characterizes the British system, under which addicts may receive narcotics by prescription as "the epitome of amoral expediency." His moral solution is compulsory civil commitment for as long as necessary. "Truly incurable addicts," he says, "are less dangerous to society when incarcerated for life on narcotic farms. . . ." J. O'DONNELL & J. BALL at 203.

79. Proposals to supply addicts with narcotics have not enjoyed a dispassionate public hearing. The conclusive argument against them has in practice been the supposed failure of the clinics established for such purposes between 1919 and 1923 in the wake of the Harrison Act. That these clinics "failed" is very much in dispute, since there are also claims for them of great success, and since "there is a complete lack of any objective criteria of success or failure." American Medical Association, *Narcotics Addiction: Official Actions of the American Medical Association* (1963), in J. O'DONNELL & J. BALL, *supra* note 12, at 182. It does appear, however, that some free drugs thus provided were diverted to illicit use. But this proves very little. The clinics were hastily organized, understaffed, and loosely supervised. *Id.* at 181; *see also* Ploscowe, *supra* note 13, at 101. Moral indignation at the whole idea of sustaining doses appears to have played a large part in the original A.M.A. opposition which led to their abandonment. *See* American Medical Association, *supra*, at 186-87. For an excellent discussion of the experience of the clinics and its contemporary relevance, see A. LINDESMITH, THE ADDICT AND THE LAW 135-61 (1965).

The whole problem of diversion of the drugs supplied could of course be simply eliminated if clinic doctors administered the drugs themselves. The expense of such a system would be considerably less than that of the new commitment programs. Its disadvantage is that addicts would be obliged to come to the clinic several times daily, which might interfere with their gainful employment. But this hardship for the addict is scarcely comparable to that inflicted by civil commitment, and if he finds it excessive, he could commit himself for treatment voluntarily.

Moreover, even if he were given instead a daily supply, he would plainly be likely to peddle only the excess over what he himself needed. It is doubtful that addicts could persuade alert doctors who see them daily into providing doses much larger than their need, even if—due to the phenomenon of tolerance—their need is not static. If this is in fact an insuperable difficulty, surely the burden of proof rests on the state to show that that is so, since only a compelling public need could legitimate the present practice of creating and then punishing criminality.

80. This approach has been specifically endorsed by the New York Academy of Medicine. *See* Committee on Public Health, Subcommittee on Drug Addiction, *Report on Drug Addiction*, 31 BULL. N.Y. ACAD. OF MED. 592 (1955), in J. O'DONNELL & J. BALL, *supra* note 12, at 191. The A.B.A.-A.M.A. Joint Committee on Narcotics called for experimental research to discover whether the administrative difficulties in such a program could be overcome. *See* JOINT COMMITTEE OF THE AMERICAN BAR ASSOCIATION AND THE AMERICAN

state to deny addicts all legal access to narcotics, the state should certainly be estopped from confining addicts for fear of the crimes it obliges them to commit.

But were the state's causal responsibility irrelevant, commitment to prevent violations of the narcotics laws would still be invalid simply because the remedy is disproportionate to the harm. It would not be contended that the state has the right to commit a person for any prolonged period because he suffers from chronic head cold, even though it is virtually certain that some persons will catch colds from him. Some criminal offenses, like some minor contagious diseases, represent harm to others so impalpable, insubstantial, or indirect that it cannot outweigh a man's liberty.

Even if the state has the right to imprison for violation of the narcotic laws, it does not follow that it has the right to confine any person solely in order to prevent such violations. Punishment responds to the culpable infraction of the law as well as to the harmful consequences the law was designed to prevent. Preventive detention, on the other hand, poses directly the conflict of values between liberty and the harm to be prevented. In that balance, the harm must be a demonstrable injury to some person or persons, or perhaps to property, if it is to support a prolonged confinement.[81] The only consequence of individual viola-

MEDICAL ASSOCIATION (Final Report), *supra* note 13, at 161. They emphasized too that the American practice of denying drugs to addicts represents a minority approach. *See also* King, *An Appraisal of International, British and Selected European Narcotic Drug Laws, Regulations and Policies, id.* at 121ff. On the British experience, *see generally id.*; *see also* E. SCHUR, NARCOTIC ADDICTION IN BRITAIN AND AMERICA (1962). The British have recently tightened government supervision of prescriptions to addicts, which were previously left largely to the discretion of private doctors.

See also Lindesmith, *Introduction* to JOINT COMMITTEE OF THE AMERICAN BAR ASSOCIATION AND THE AMERICAN MEDICAL ASSOCIATION (Final Report), *supra* note 13, at xiii-xiv:

> For several years most Americans, assuming that American methods of handling addicts were standard practice have regarded suggestions that addicts be given access to legal drugs as a startling, radical, or dangerous idea. At the same time it has apparently seemed quite normal and acceptable to them that alcohol and barbiturate addicts obtain their supplies legally without police interference, despite the fact that the alcohol and barbiturate habits are probably at least as harmful and more prevalent than is addiction to heroin or morphine . . . . [I]n reality it is the European practices which are standard rather than the American.

In support of supplying drugs to addicts see Howe, *An Alternative Solution to the Narcotics Problem*, 22 LAW & CONTEMP. PROB. 132 (1957); A. LINDESMITH, THE ADDICT AND THE LAW (1965), *especially* ch. 5 at 135-161 and ch. 10 at 269-302.

81. Insofar as they have considered it, the courts have not seen the question in this light. They have made no distinction between what conduct merits punishment and what warrants anticipatory confinement.

> It is enough if there is competent evidence that [a man] may commit any criminal act, for any such act will injure others and will expose the person to arrest, trial, and conviction.

Overholser v. Russell, 283 F.2d 195, 198 (D.C. Cir. 1960). For good measure, the court threw in what is either a novel paternalistic argument or else a highly novel concept of dangerousness:

tions of the narcotic laws is a possible remote contribution to the addiction of some other person; and such indirect and wholly speculative harm cannot be grounds for commitment.[82]

In sum, addiction by itself meets the burden of proof for preventive detention only with regard to violations of the narcotic prohibition laws; and the danger of such violations is not a sufficient ground for commitment. Addiction together with poverty may make a case for confinement of many, but not all, addicts because of the danger of theft offenses. But liberty may well outweigh this threat to property as well.[83] The state may be required to wait until the addict steals before it confines him, and to set him free when his sentence has run.[84] Needless to say, when it does punish an addict for any offense, nothing prevents the state from doing all it can to cure him of his dangerousness by attempting to cure him of his addiction while he is under sentence.

There remains one final question. If a brief confinement could cure a compulsive offender of his compulsion to offend, civil commitment might then be permissible to prevent relatively trivial offenses, and perhaps the burden of proof might be relaxed. The reason is not, of course, that treatment might benefit the individual, but rather that the

There is always the additional possible danger—not to be discounted even if remote—that a nonviolent criminal act may expose the perpetrator to violent retaliatory acts by the victim of the crime. *Id.*

See also Carras v. District of Columbia, 183 A.2d 393, 395 (D.C. Cir. 1962).

82. As a practical matter, the liberty which is thus protected against preventive detention is a poor and ephemeral thing as long as the addict is subject to severe prison sentences for purchasing, possessing, or using narcotics. It is in effect the liberty to escape detection. But the certainty that the addict will break the law also calls in question the legitimacy of punishing addicts for such offenses under traditional principles of *mens rea*. *Cf.* Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966) and Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966), holding that an alcoholic cannot be punished for public appearances while intoxicated which he makes under compulsion of his disease. But the courts have refused to grant addicts a defense of "pharmacological duress" to prosecution for use or possession. Castle v. United States, 347 F.2d 492 (D.C. Cir. 1964), *cert. denied*, 381 U.S. 929 (1965). They have also refused to apply the rationale of *Robinson v. California*, 370 U.S. 660 (1962), on which the *Driver* and *Easter* cases also relied, to narcotics offenses committed by drug addicts, at least in part because the *Robinson* Court expressly refused to do so. *See* Hutcheson v. United States, 345 F.2d 964, 977, 977 n.26 (D.C. Cir.) (opinion of Bazelon, J.), *cert. denied*, 382 U.S. 894 (1965).

83. Liberty ordinarily outweighs property in the scales of due process. As long as the state may punish for thefts committed under the duress of need for drugs (and "as long as" is likely to be for very long indeed), the total risk to property is not excessive. If addicts could not be imprisoned, and the risk were therefore of an infinite number of thefts, the case might well be different. At some point, surely, the social interest in preservation of property rights is more important than a sick man's liberty.

84. By punishing an addict when he steals under compulsion of his disease, the state treats him as though he were capable of refraining from theft: if he were conceded to be incapable of doing so, punishment would be manifestly inappropriate. The law should raise the same presumption of responsibility when the issue is detention to prevent such thefts: if the addict is presumed to have some control over his actions, then it cannot be proved beyond a reasonable doubt that he will steal, and he may not be preventively detained.

deprivation of liberty is more nearly comparable to a quarantine. If the chronic common cold could be permanently cured by a week in a solarium, the social benefit would probably be worth the cost in liberty and sunburn. The prevention of an infinite number of minor infractions might well be thought to permit some strictly limited loss of liberty where it would not justify more. But this theoretical possibility is academic in the case of narcotic addicts. The cure for addiction, if it comes, will not come quickly; and the chances are it will not come at all.

Conclusion

If they are applied as written, New York and California addict-commitment programs are almost certainly unconstitutional. They permit commitment of doctors and other mentally competent addicts who pose no threat to the safety or welfare of others. Since any private citizen may initiate a commitment proceeding, and since the courts have no discretion to refuse commitment of any one found to be an addict, there is a real danger that such persons will actually be committed. Moreover, there are also serious questions about the validity of commitment of the mass of lower-class addicts at whom the statutes were primarily directed. Many of these persons are both dangerous to others and much in need of help. But there are other remedies for their dangerousness, and the case for helping them against their will would be stronger if either the chances of success or the probable conditions of their subsequent life were better than they are.

On the other hand, many addicts are plainly proper subjects for commitment. But since addiction alone never justifies commitment, each addict must be given a hearing to determine whether the state has the right to commit *him* against his will. The state must show either that he is clearly incompetent to decide for himself whether to accept institutional treatment, or that he will beyond a reasonable doubt cause substantial harm to others unless he is confined. The fact of addiction is good but not conclusive evidence of the former proposition; it is weak evidence of the latter, and it would be virtually no evidence at all if addicts could legally obtain the drugs they require.